FILED
FEB 24 1903
JAMES H. McKENNEY,
Clerk

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 102.

ANTOINETTE D. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLANTS.

CHARLES S. VARIAN,
For Appellants.

FRANKLIN S. RICHARDS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 398.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY, APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION, APPELLEE.

BRIEF FOR APPELLANTS.

I.

This cause comes here upon the question of jurisdiction alone, duly certified from the Circuit Court, under Section 5 of the act, entitled, "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

The case was brought originally in the state court, and being removed in due time to the Circuit Court, the question was made by motion to remand, that the requisite diversity of citizenship at the time of the bringing of the suit, was not disclosed by the petition for removal and record in the state court. The suit was brought by appellants to procure an accounting and the redemption of real property from the lien of a trust deed or mortgage. Complaint was filed August 25, 1899, and summons issued and served. (Record, 1, 7, 8.)

On September 2, 1899, the appellee presented its petition and bond for the removal of the cause to the Circuit Court of the United States for the District of Utah, and, on the same day, the order for removal was made. The transcript of record was filed in the Circuit Court on the 28th day of November, 1899, and in due time. (Record, 9, 10, 71.)

The petition for removal stated: "That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of this suit and still is a res-

ident and a citizen of the city of Denver and State of Colorado." (Record, 9, 71.)

The bond on removal stated: "That the Columbia Savings and Loan Association, a corporation of Denver, Colorado, as principal," with its surety, made the bond, etc. (Record, 10, 71.)

The original complaint of appellants stated: "That at all times hereinafter mentioned, the defendant was and now is, a corporation organized and existing under the laws of the State of Colorado." (Record, 1, 71.)

As shown by the certificate of the Circuit Court no other fact of or concerning the citizenship or residence of the parties, is stated or set out in the record as made at the time of the removal. (Record, 71.)

If the allegation of the complaint as to the organization and existence of the appellee as a corporation under the laws of Colorado be sufficient to supply the omission of averment in the petition and bond for removal, still, there is nothing in the record anywhere to show the citizenship of the appellants at the time the suit was brought.

Upon the filing of the record in the Circuit Court the appellants entered a motion to remand, because the matter in dispute did not exceed $2,000.00, etc., and, on the same day, appellee filed a pleading designated as an "answer and cross complaint." (Record, 11, 12, 72.)

Afterwards, on the 30th day of December, 1899, appellants entered a motion for leave to amend their motion to remand by "adding thereto as a specific ground for the the remanding of said cause, that the diverse citizenship of the parties at the time of the commencement of the suit and at the time of the removal of the cause from the State court, does not appear upon the record." (Record, 20.)

The order denying the motion was made on January 6, 1900, by Judge Riner (sitting for Judge Marshall), who, at the same time. allowed the appellee to amend its petition for removal and cross complaint by adding statements as to the citizenship of appellants at the time of the bringing of the suit. (Record, 22, 23, 72.)

Afterwards, by leave of the court, appellants made a second motion to remand on the ground that the petition for removal and record did not disclose the diverse citizenship of the parties at the time of the commencement of the suit, and at the time of the removal thereof. (Record, 24, 72.)

The second motion was, on April 23, 1900, denied by the court, Marshall, J., presiding, *solely* because a similar motion had been heard and decided by another judge, "with co-ordinate jurisdiction and powers, holding this court."

Opinion of court and certificate, etc. (Record, 25, 72.)

Thereupon, the pleadings were re-cast and the cause proceeded to final decree, dismissing appellants' bill, and finding for appellee upon its cross bill, etc. (Record, 64, 65.)

At the same term, an appeal was prayed and allowed, upon the sole question of the jurisdiction of the court, and a certificate thereof made, as provided by law. (Record, 67, 68, 70, 71, 72.)

The assignment of errors is based upon the denials by the court of the two motions to remand, the order allowing the amendments to the petition for removal and the cross complaint, and the entry of the decree, because, as alleged, the court had no jurisdiction to hear and determine the cause. (Assignment of Errors, Record, 69, 70.)

The certificate of the jurisdictional question was, by consent, amended so as to show that the appellee gave notice of its motion for leave to amend the petition for removal on the 2d day of January, 1900, and that the proposed amendment was filed on the 3d day of January, 1900, and the motion to remand was argued and submitted on the 4th of January, 1900. (Record, 74, 75.)

The certificate shows all of the foregoing proceedings, and further states: "The case, as made by the complaint, did not in anywise involve the construction or application of the constitution of the United States, and did not draw in question the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, and did not contain any claim that the constitution or any law of any state was in contravention of the constitution of the United States." (Record, 71, 72.)

In Colvin v. Jacksonville, (158 U. S., 459), the Chief Justice observes that the court is confined in the disposition of the cause to the *certificate*. If, by this, it is to be understood that the court will not look outside of the certificate nor to the remainder of the record, there would seem to be no necessity of bringing to this court in this class of cases, the record at large. With no express direction by the court to guide us, however, we have brought up all of the record material to the inquiry. The *certificate* contains, also, a full and complete statement of the proceedings.

II.

The several assignments of error are all directed to the single question of jurisdiction. It is manifest, that when the removal from the state court was had, that court had not lost jurisdiction, and of course the Federal Court had not acquired jurisdiction. Upon the hearing and decision of the first motion to remand, it was sought to deprive the state court of jurisdiction, by amendments to the petition for removal and

the cross complaint first filed in the Circuit Court. Evidently, it was supposed, that by this proceeding the jurisdiction of the cause, which theretofore had remained in the state court, *eo instanti* was devested, and at once vested in the Federal Court.

In view of the express decisions of this court upon such question, the ruling of the court upon the proposed amendments must have been predicated upon the assumption that the allegations in the petition and bond for removal, to the effect that the controversy was between citizens of different states, and that appellee was, at the time suit was brought, a citizen of Colorado, coupled with the allegation of the original complaint that appellee was *organized* and *existing as* a corporation under the laws of that state, were imperfect statements of facts showing a right to the transfer.

There is here, however, a total failure to allege the citizenship of the appellants at the commencement of the suit, and we find no decision of this court that a general allegation of diversity of citizenship at the time removal is sought, is sufficient to devest the State court of its jurisdiction.

As said in Stone v. South Carolina, (117 U. S., 430):

> "A State court is not bound to surrender its jurisdiction of a suit on removal until a case has been made which on its face shows that the petitioner has a right to the transfer."

In Carson v. Dunham, (121 U. S., 421), the petition for removal was based upon diversity of citizenship, which was fully alleged, and upon a Federal question made under the laws of the United States.

In the Circuit Court the question of citizenship was tried and found adversely to the defendant, but, in as much as the cause had been rightfully removed, and the jurisdiction thereof vested in the Circuit Court, it was held that the imperfect statements of the petition as to the other ground of removal, might be expanded and perfected by amendment.

The rule seems to be established that such amendments may be allowed by the Circuit Court when, and when only, the petition for removal as presented to the State court, upon its face, in connection with the remainder of the record made at that time, shows sufficient ground for removal.

> Crehore v. O. & M. R. R. Co., 131 U. S., 240;
> Jackson v. Allen, 132 U. S., 27;
> Martin v. B. & O. R. R. Co., 151 U. S. 691;
> Powers v. C. & O. Ry. Co., 169 U. S., 101.

Upon the question of jurisdiction made here, and the duty of the Circuit Court to decline jurisdiction at any time,

notwithstanding a prior order in the premises, we rely upon the uniform decisions of this court.

Stevens v. Nichols, 130 U. S., 230;
Glashill v. N. P. Ry. Co., 144 U. S., 211;
U. P. R. R. Co. v. Fitzgerald, 160 U. S., 580,
La Confiance Compagnie, etc., v. Hall, 137 U. S., 61;
Kellam v. Keith, 144 U. S., 569;
Mattingly v. R. R. Co., 158 U. S., 53.

And at the Circuit:

Dalton v. M. M. Ins. Co., 118 Fed., 876.

The appellants, who were defendants in the cross bill, objected to the jurisdiction from the beginning, while the appellee, plaintiff in the cross bill, insisted upon the court taking jurisdiction. Judgment on the merits was rendered in favor of the plaintiff in the cross bill.

The case then is within subdivision three of the rule as to the appellate jurisdiction, announced in United States v. Jahn, (155 U. S., 115).

The case should be reversed, with directions to remand to the State court.

Respectfully submitted,

CHARLES S. VARIAN,
For Appellants.

FRANKLIN S. RICHARDS,
Of Counsel.